Supreme Court, U.S.
FILED
MAY 9 1994
OFFICE OF THE CLERK

No. 93-1721

In The

Supreme Court of the United States

October Term, 1993

COBB COUNTY, GEORGIA,

Petitioner

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822

MARSHALL L. COHEN
55 Marietta Street
Suite 1830
Atlanta, Georgia 30303

GERALD R. WEBER
ACLU of Georgia, Inc.
142 Mitchell Street
Suite 301
Atlanta, Georgia 30303

MICHAEL R. HAUPTMAN
34 Peachtree Street, NW
Suite 2200
Atlanta, Georgia 30303

Attorneys for Respondents

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts err in their fact-based determination that the prominent placement of the Ten Commandments in a courthouse, accompanied by a quote from Jesus to "Love the Lord," but unaccompanied by any secular messages, violates the Establishment Clause?

II

Did the lower courts correctly hold that respondents had standing to challenge the constitutionality of a religious display that was maintained with county funds and with which they had frequent and unwelcome contact?

No. 93-1721

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

COBB COUNTY, GEORGIA, *Petitioner*

v.

BRUCE S. HARVEY and JAMES D. CUNNINGHAM

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, Bruce S. Harvey and James D. Cunningham, respectfully submit this Brief in Opposition to the Petition for Certiorari filed in the above-captioned case.

STATEMENT

The religious display declared unconstitutional in this case is a three-by-five foot panel of a peculiarly Christian version of the Ten Commandments, combined with selected teachings of Jesus Christ commanding love of God and neighbor. *See* District Court Judgment, Pet. App. 5a-8a. The panel stands alone in the Cobb County State Courthouse in a recessed shrine-like marble alcove above the only bench on the first floor. *See* id. at 5a. The vicinity of the panel is frequented by litigants, jurors, attorneys, and courthouse staff. The panel hangs next to the Clerk's office and across the hall from the Traffic Court courtrooms. *See* id. The County does not post any explanation of the origin or purpose of the display, nor is the display part of any larger exhibit.

The County's own witnesses at trial admitted that the County in 1967 moved the panel from its former location outside the old courthouse to its present location. The County's witnesses testified that a cleaning crew consisting of County employees and inmates (housed, fed, transported, and supervised at County expense), have cleaned the panel on several occasions, including one instance when the panel was removed and replaced in order to clean the heavy build-up of nicotine. *See* id. at 8a-9a.

Respondent Bruce Harvey is a criminal defense attorney who practices in the Cobb County State Court and Traffic Court. The trial court found that he had come into direct and unwelcome contact with the display each time he was in the building. *See* id. at 9a-10a. The district court concluded that Harvey had citizen standing. *See* id. at 12a-15a. Respondent James Cunningham is a Cobb County

resident, property owner, and taxpayer. The trial court found that Cobb County had used public money in the maintenance and upkeep of the display. *See* id. at 16a. The district court ruled that Cunningham had taxpayer standing. *See* id. at 15a-16a.

On the merits, the district court held that the religious display was unconstitutional. However, the district court stayed its order for four months to allow the County, "in consultation with plaintiffs, an opportunity to develop an educational display including the Ten Commandments panel." *See* id. at 22a. Rather than pursue this option, the County appealed to the Eleventh Circuit which upheld the district court in all respects.

ARGUMENT

1. Despite Petitioner's attempt to liberate this case from its facts, the issue presented here is purely contextual: whether the district court erred in applying the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in determining the constitutionality of a tablet depicting a Christian version of the Ten Commandments and quotations from Jesus Christ, standing alone and prominently placed in a state court building. The district court, as affirmed by the Court of Appeals, undertook a sensitive analysis of *Lemon*'s second prong, as refined in such cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *Allegheny v. ACLU of Pittsburgh*, 492 U.S. 573 (1989). The district court judgment, reprinted at Pet. App. 5a-9a, 19a-21a, carefully considered both the religious content of the tablet and the conditions of its display on government property.

No more could be asked of a court in applying the second prong of *Lemon*. And, despite Petitioner's entreaties, Pet. 18-25, this case is wholly unsuitable as a vehicle to overrule *Lemon* and its progeny. Even if this Court were so disposed to totally recast its Establishment Clause analysis, the very narrow focus of this case would require this Court, in any event, to adopt precisely the same content/context inquiry as used by the district court.

In addition to its argument for jettisoning *Lemon*, Petitioner also requests that this Court overrule *Stone v. Graham*, 449 U.S. 39 (1980), which spoke specifically to public displays of the Ten Commandments. *Stone* settled the matter raised in this case, and Respondents are unaware of any other litigation which seeks to question whether public display of the Commandments, in a courthouse setting, violates the Establishment Clause. Petitioner attempts to create a conflict by citing *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973), but *Anderson* was decided seven years before this Court's ruling in *Stone*, and on facts which suggested that the display of the Ten Commandments was accompanied by historic symbols and imagery. *See* 475 F.2d at 30.

2. Likewise, plenary review of the standing issues raised by Respondent would be pointless. The district court held, and the Court of Appeals affirmed, that *both* Respondents had standing: Harvey as a citizen, Cunningham as a taxpayer. This Court would have to reverse as to both individuals in order to effect a reversal.

More importantly, the district court's analysis of the standing issues is completely consistent with this Court's decisions in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and *Abington School District v. Schempp*, 373

U.S. 203 (1963). The district court made factual findings that Harvey had come into repeated, direct and unwelcome contact with the religious display. Pet. App. 14a. Likewise, the trial court found that Cobb County had expended public funds for the maintenance of the display, thus triggering Cunningham's taxpayer standing. Pet. App. 16a. Petitioner has nowhere indicated how these factual findings conflict with this Court's standing jurisprudence under the Establishment Clause. Cobb County is simply seeking Supreme Court review on standing issues properly disposed of by specific factual findings at trial.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

DAVID J. BEDERMAN
Counsel of Record
Gambrell Hall
Atlanta, Georgia 30322-2770
Phone (404) 727-6822

MARSHALL L. COHEN
55 Marietta Street
Suite 1830
Atlanta, Georgia 30303

GERALD R. WEBER
ACLU of Georgia, Inc.
142 Mitchell Street
Suite 301
Atlanta, Georgia 30303

MICHAEL R. HAUPTMAN
34 Peachtree Street, NW
Suite 2200
Atlanta, Georgia 30303

Attorneys for Respondents

May 5, 1994